

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'B' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.719 & 720/PUN/2019
निर्धारण वर्ष / Assessment Years : 2010-11 & 2011-12

ITO, Ward-2, Jalna	Vs.	M/s. Rutuja Ispat Pvt. Ltd., C/o. S.B. Badjate & Associates, Ahinsa Marg, Jalna – 431 203 Maharashtra PAN : AACCR8562P
Appellant		Respondent

आयकर अपील सं. / ITA Nos.721 & 722/PUN/2019
निर्धारण वर्ष / Assessment Years : 2010-11 & 2011-12

M/s. Rutuja Ispat Pvt. Ltd., C/o. S.B. Badjate & Associates, Ahinsa Marg, Jalna – 431 203 Maharashtra PAN : AACCR8562P	Vs.	ITO, Ward-2, Jalna
Appellant		Respondent

Assessee by Shri Pramod Shingte
Revenue by Shri Ajay Kumar Kesari

Date of hearing 17-07-2023
Date of pronouncement 20-07-2023

आदेश / ORDER

PER BENCH :

These four appeals consisting of two sets of cross appeals for the assessment years 2010-11 & 2011-12 involve some common issues. For the sake of convenience, we are proceeding to dispose them off by this consolidated order.

A.Y. 2010-11 :

2. The first ground assails the initiation of reassessment proceedings.

3. Succinctly, the facts of the case are that the assessment in this was originally completed u/s.143(3) of the Act at a total income of Rs.1,36,25,352/-. Thereafter, the AO initiated the reassessment proceedings by means of notice u/s.148. The assessment was completed u/s.143(3) r.w.s. 147 of the Act determining total income at Rs.102,64,98,000/-. The assessee unsuccessfully challenged the initiation of reassessment proceedings before the Id. CIT(A).

4. Having heard the rival submissions and gone through the relevant material on record, it is seen that the reassessment was initiated on the basis of reasons dated 23-01-2017, reading as under:

“Assessee is Private Limited Company. Excise department carried out search action in the premises of company. During the course of search action excise department seized pendrive data on which unaccounted purchases and sales were reflected. They also recorded statement of Sushil Subhshchandra Badjate Director of company. On verification of data and statement of Sushil Badjate it is seen that there is suppression of sales to the extent as under :

Period	Amount
1-1-2009 to 31-12-2009	Rs.878987600/-
1-1-2010 to 31-12-2010	Rs.410704227/-
1-1-2011 to 07-03-2011	Rs.37441251

The Hon'ble High Court in its decision observed the same fact and also directed that assessee has evaded Income tax hence Income tax department needs to take remedial action. From the

record of the excise department as well as on verification of the ITRs it is seen that the assessee has evaded Income tax relating to the suppressed sales as mentioned above. Total underassessment of the Income is more than Rs.50 crore as above for A.Y. 2010-11.

Therefore, I am satisfied that this is a fit case for issue of notice u/s.148.

Jalna
Dt.23/01/2017

Sd/-
(G.V. Athawale)
Income-tax Officer,
Ward-2, Jalna”.

5. It is apparent from the above reasons that the search action taken by the Excise Department at the premises of the assessee resulted into seizure of pen-drives containing data of unaccounted purchases and sales. Statement of the director of the assessee company was also recorded, which fortified the data of the suppression of sales for the year under consideration and subsequent year. In a writ petition filed by a majority shareholder of the assessee company, who also happens to be father of the director, the Hon’ble High Court took note of the facts of the instant case. We have also perused the judgment of the Hon’ble Bombay High Court in the writ petition, whose copy has been placed on record. The judgment dated 15-04-2015, dismissing the writ petition, records that there was specific information with the officers of the department of Directorate General of Central Excise(Intelligence), Regional Unit, Pune on the assessee-company

evading Central Excise Duty by not maintaining account of Manufacturing of MS/TMT bars and it was involved in clandestine removal of the finished products from the factory premises without payment of Central Excise duty. There was also information that the assessee company was purchasing unaccounted MS Ingots/Billets for the manufacture of the aforesaid products, which were unrecorded. A separate record was prepared about the unaccounted manufacture and sale etc., which was available in the pen-drives and in the computers of the assessee company. Not only the petition of the majority shareholder of the assessee company was dismissed, the Hon'ble High Court clearly recorded in para No.28: "That relevant material is already discussed and it shows that present petitioner was involved in running of the business and he was collecting sale proceeds.. There is prima facie case for evasion of excise (sic. estate) duty and also non-payment of income-tax on the income made by utilizing aforesaid modus operandi". The Hon'ble High Court further held that not only the duty payable was to be ascertained under the present Act: "*but the Income-Tax authorities need to take action in present case.*When such matter comes before Court it is also duty of the Court to see that the Income Tax Department is heard in such a case and intimation of the incident is given to the Income Tax Department also". In para No.29, the Hon'ble High Court further observed that

“The material is sufficient to make out a prima facie case that he was involved in running of the business and he was collecting money, sale proceeds in respect of the excisable goods”. Para No.30 further notes that *“The material collected shows that false record was created for evasion of excise duty. Thus, it is a case of forgery and fraud also. There has been evasion of excise duty in respect of goods worth more than Rs.140 crore”*. It was on the basis of - the information received from Central Excise Department to the effect that the assessee company was clandestinely engaged in manufacturing and evading excise duty; which was fortified by the director of the assessee company in his statement during the course of search; and further the observations of the Hon’ble High Court to the effect that *“the Income Tax authorities need to take action in the present case”* - that the AO entertained the well-deserved belief about the escapement of income and consequently issued notice u/s.148 of the Act. We see absolutely no reason on the part of the assessee to assail the correctness and legal validity of the reasons recorded by the AO for initiating the reassessment proceedings. This ground is, therefore, dismissed.

6. The first issue raised by the assessee as well as the Revenue is in respect of addition of Rs.83,44,13,683/- made by the AO. During the course of search by Central Excise authorities, it was established that the assessee was engaged in manufacturing the goods outside the

books of account and selling the same without payment of excise duty. Pen-drives were found in the course of search containing data of unrecorded sales. Such amount of unrecorded sales pertaining to the year under consideration stood at Rs.83,44,13,683/-, which was added by the AO. The ld. CIT(A), however, reduced the addition to Rs.3,90,50,750/- by limiting it to the declared gross profit rate of 4.86%. That is how, both the sides have come up in appeal before the Tribunal on their respective stands.

7. Having heard the rival submissions and gone through the relevant material on record, it is explicitly clear that the figure of unrecorded sales for the year under consideration amounting to Rs.83.44 crore was found noted in the computers of the assessee. Such data was found by the custom authorities during the course of search. The ld. AR argued that achieving this level of unrecorded sale was humanly impossible considering the capacity of the assessee company and hence the amount of such unrecorded sales be reduced. He put on record some working showing the possible unrecorded sales at a much low level. We are disinclined to accept the assessee's contention for the obvious reason that the figure of unrecorded sales was deduced from the data found in the assessee's computer during the course of search by Central Excise authorities. Not only this, even the director of the assessee company also accepted the unrecorded

sales at this level during the course of search. The later retraction is of no avail because the data from the computer corroborated the amount of unrecorded sales. We, therefore, reject the assessee's version about the amount of unrecorded sales at a level lower than that taken note of by the authorities below.

8. The second connected issue is the making of addition in respect of such unrecorded sales. Whereas the AO added the amount of sale itself as the undisclosed income, the Id. CIT(A) reduced it to the declared gross profit rate at 4.86% for the year under consideration. It goes without saying that tax is not charged on the amount of sales but on the income embedded in such sales. It clearly emerges from the discussion made in the assessment order that not only the sales but also the purchases were unrecorded. The assessee was into manufacturing the goods outside the books of account to evade excise duty. Since both the sales and corresponding purchases were unrecorded, it is but natural that only the profit element could have been added and not the amount of sales in entirety. We, therefore, affirm the view taken by the Id. CIT(A) in restricting the addition to the level of gross profit rate declared by the assessee for the year under consideration. The grounds taken by the assessee as well as the Revenue in this regard stand dismissed.

9. The second issue in the cross appeals is against the addition of Rs.17,05,54,156/- made by the AO on account of working capital required for manufacturing the goods outside the books of account, which was reduced by the Id. CIT(A) to 50%.

10. After considering the rival submissions and perusing the relevant material on record, it is seen from page 50 of the assessment order that the AO calculated the working capital of Rs.3.04 crore as per the books of account and also considered the amount of turnover recorded in the books at Rs.14.92 crore, thereby computing the ratio of working capital to total turnover at 20.44%. This percentage was applied to the amount of suppressed production for computing the addition on account of working capital utilized for suppressed production at Rs.17.05 crore. The Id. CIT(A) held that the estimation of 2 months' of working capital by the AO was wrong. He reduced it to 1 month, which resulted into reducing the addition by 50%. The sum and substance of the addition made by the AO is that the assessee utilized the undisclosed working capital for manufacturing the goods outside the books of account. It has been noticed above that the assessee accepted before the authorities that all the purchases as well as sales in relation to the suppressed sales of Rs.83.44 crore were unrecorded. The Tribunal in the assessee's own case for the assessment year under consideration anent to the original assessment order passed u/s.143(3)

of the Act, has held that the amount required for making unrecorded purchases was utilized from unrecorded sales. A copy of such order in ITA No.2071/PUN/2014 and 2023/PUN/2014 has been placed on record at page 46 onwards of the paper book. In the original assessment, the AO estimated suppressed production on the basis of higher electricity consumption and also made addition towards working capital required for purchase of raw materials and day-to-day activities. The Id. CIT(A), firstly, sustained the addition at the level of the gross profit rate applied on the undeclared sales and deleted the addition towards the working capital. Both the assessee as well as the Revenue came up in appeal before the Tribunal. The Revenue raised ground No.3 in its ITA No.2023/PUN/2014 challenging the deletion of addition towards working capital. The Tribunal, relying on certain orders, upheld the deletion of addition on account of working capital. Since the issue under consideration is fully covered by the order of the Tribunal in assessee's own case for the year under consideration itself, we are satisfied that no addition was called for on account of working capital required for the suppressed production and the same was rightly deleted. The ground of the assessee is allowed and that of the Revenue is dismissed.

11. The next ground in the Revenue's appeal is against the deletion of addition of Rs.79,04,807/- made by the AO in respect of cash deposited in the bank account of the three employees. The facts apropos this ground are that the assessee was found to have done unrecorded business of manufacturing and sale of goods in the names of three employees. A sum of Rs.79,04,907/- was deposited in their bank accounts. The AO made addition for the same, which came to be deleted in the first appeal.

12. Having heard both the sides and gone through the relevant material on record, it is seen that the assessee admittedly carried on the business of unrecorded sales in the name of its three employees. In that view of the matter, the contention of the assessee that these accounts did not pertain to it, has no substance. Coming to the deposits of Rs.79.04 lakh made in these accounts, it is seen as an admitted position that unrecorded sale of Rs.83.44 crore were effected in cash. Deposits of Rs.79.04 lakh in the bank accounts of these three persons, cannot be separately added for the obvious reason that the unrecorded sales realized in cash were to the tune of Rs.83.44 crore. It is but natural that the cash realized on unrecorded sales was utilized for making purchases as well as meeting expenses in addition to deposit of Rs.79.04 lakh. Since we have upheld the addition of Rs.3.90 crore towards profit on unrecorded sales, which is far in

excess of amount of bank deposits of Rs.79.04 lakh, we hold that the Id. CIT(A) was justified in deleting the addition to this extent.

13. The only other ground which survives in the Revenue's appeal is in respect of Rs.78,00,55,966/- which was computed by the AO as the amount disallowable u/s.40A(3) in respect of cash purchases for effecting unrecorded sales, but not added in the computation of total income because the amount of unrecorded sales of Rs.83.44 crore was added. Obviously, there was neither any occasion for the assessee to challenge this not-made addition nor for the Id. CIT(A) to record any finding on it. In such a scenario, the Revenue cannot have any grievance against this not-made addition not dealt with in the impugned order.

14. Moreover, disallowance u/s 40A(3) can be made in respect of some specific cash purchases exceeding the prescribed limit. The existence of some evidence of the purchases in cash is *sine qua non* for making the disallowance. Adverting to the facts of the present case, it is seen that there is no specific reference to any cash purchases exceeding the prescribed amount, warranting disallowance u/s 40A(3) of the Act. In fact, the addition on account of such unrecorded business was made by the AO on the basis of unrecorded sales and sustained in the first and the second appeals on the basis of gross profit rate applied on such unrecorded sales only without any

reference to any specific amount of purchases in cash. We, therefore, hold that the grievance of the Revenue on the not-made addition by the AO u/s 40A(3) of the Act is uncalled for. This ground is, therefore, not allowed.

15. In the result, the appeal of the assessee is partly allowed and that of the Revenue is dismissed.

A.Y. 2011-12 :

16. We have heard both the sides and gone through the relevant material on record. It is seen that the facts and circumstances of the cross appeals by the assessee as well as the Revenue for the year under consideration are *mutatis mutandis* similar to those for the immediately preceding assessment year.

17. Following the view taken hereinabove, we dismiss the assessee's ground challenging the initiation of reassessment proceedings and also the correctness of the amount of unrecorded sales. We sustain the order of the Id. CIT(A) in reducing the addition of Rs.23.87 crore made towards unrecorded sales to Rs.2,65,96,355/-, being, the declared gross profit rate for the year at 11.14% applied to such unrecorded sales. The grounds taken by the assessee as well as the Revenue in this regard are, ergo, dismissed.

18. The next ground of the Revenue against the deletion of addition of Rs.29,95,048/- made by the AO towards cash deposited in the bank account of the employees is jettisoned because the amount of addition of profit on unrecorded sales sustained at Rs.2.65 crore is much more than the amount of cash deposited in the bank account of the employees at Rs.29.95 lakh.

19. Similarly, the issue of the non-addition worked out u/s.40A(3) by the AO at Rs.21,54,55,939/- but not made in the assessment order is also not interfered with.

20. In the result, the appeal of the assessee is partly allowed and that of the Revenue is dismissed.

Order pronounced in the Open Court on 20th July, 2023.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 20th July, 2023
सतीश

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The respondent
3. The CIT-1, Aurangabad
4. DR, ITAT, 'B' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,**// True Copy //**

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	17-07-2023	Sr.PS
2.	Draft placed before author	18-07-2023	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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